No. 92-949

In The

Supreme Court of the United States

October Term, 1992

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP.)
JOSE A. PURCELL,

Petitioners,

versus

THE COMMONWEALTH OF PUERTO RICO;
HON. MILACROS RIVERA GUADARRAMA;
HON. LUIS SAAVEDRA SERRANO;
HON. CARLOS RIVERA MARTINEZ,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' OPPOSITION

JUAN R. MARCHAND-QUINTERO
Counsel for Petitioners
P.O. Box 4227
San Juan, P.R. 00902-4227
(809) 721-2495

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

To the Honorable Court:

Petitioners El Vocero de Puerto Rico (Caribbean International News Corp.) and José A. Purcell respectfully submit the present brief in reply to that filed by respondents on March 24, 1993, in opposition to our Petition for Certiorari.

A. Introductions

On February 18, 1993 Respondents requested a stay of proceedings alleging that a proposed bill to amend Rule 23 P.R.R.Cr.Proc. pending before the Puerto Rico legislature would render this case moot. We openly questioned that statement in our Motion for Summary Reversal of February 23, 1993. No bill *had* been filed then, and none *has* been filed thereafter.

The conflict between the First Circuit and the P.R. Supreme Court regarding the constitutional validity of private preliminary hearings is now final and firm.[1] This Court's decision on the merits has been rendered essential.

Respondents have chosen not to address these matters.

B. Discussion

Certain arguments by Respondents are repetitive, and we respectfully refer to our Petition for Certiorari. As

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[1] See, *Rivera Puig v. García Rosario*, ___ F.2d ___ 1992 WL380014 (1st Cir. P.R.), 1992 U.S. App. LEXIS 33424, discussed in our Supplemental Brief of January 11, 1993.

to the applicability of evidence rules, see pp. 14-15; as to the accused's right to present exculpatory evidence, see p. 19; as to post-hearing review, see pp. 20-21. These are procedural points; none goes to the scope or nature of the hearing.

Respondents insist (p. 8) on calling the Puerto Rico hearings "investigatory," while admitting that the prosecution must show "it has mustered" evidence of probable cause. Clearly, the prosecution must investigate *before* the hearing, to submit the evidence for adjudication *during* it. See pp. 21-22 of our Petition.

Rule 23 was partially derived from Rule 5 Fed.R.Cr.Proc. when it was enacted in 1964. We take exception to the statement that this responded to California's not having "rules providing for preliminary hearings" (p. 4 of Respondents' Brief). California hearings before a neutral magistrate have been public since it adopted the Field Code in 1851; section 868 came to life in 1872. California hearings were open before *trials* became public in Puerto Rico under Spanish rule in 1888; they were over a century old when Rule 23 was adopted.

We now address two arguments by Respondents that deserve closer attention.

1. The meaning of "probable cause"

Respondents state that the "probable cause" required in California differs from that required in Puerto Rico. The best refutation to that proposition is a correct reading of *People v. Slaughter* (1984) 200 Cal.Rptr. 448, 35 Cal.3d 634, 677 P.2d 854, cited only partially by Respondents.

> "[A] magistrate conducting a preliminary examination must be convinced of only such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. [Citations.] In other words, 'Evidence that will justify a prosecution need not be sufficient to support a conviction . . . *An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.* [Citations.]' " 200 Cal.Rptr. at 451. (Italics in the original text).

The court held that a magistrate's dismissal of charges is reversible "if the evidentiary record discloses a rational basis for believing the defendant guilty of the charged crime." 200 Cal.Rptr. at 455. The "strong suspicion" language is seen as another way of expressing the "rational basis" test which has traditionally applied in California.[2]

Respondents argue that probable cause in Puerto Rico merely requires a *scintilla*[3] of evidence. They only cite the opinion below as authority, because the term is not found in any of the other forty-four (44) decisions of the P.R. Supreme Court pertaining to Rule 23 hearings. The court below made inappropriate use of the term to

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[2] See, e.g., *People v. Orin* (1975) 13 Cal.3d 937, 947, 120 Cal.Rptr. 65, 533 P.2d 193; *Taylor v. Superior Court* (1970), 3 Cal.3d 578, 582, 91 Cal.Rptr. 275, 477 P.2d 131; *Rideout v. Superior Court*, (1967) 67 Cal.2d 471, 474, 62 Cal. Rptr. 581, 432 P.2d 197. See also, *People v. McGlothen* (1987) 235 Cal.Rptr. 745, 190 Cal.App.3d 1005, a more recent case that cites *Slaughter* and *Rideout*.

[3] A "scintilla", although not defined by respondents, is "a barely perceptible manifestation: the slightest particle or trace <a scintilla of evidence>". Vol. III, Webster's Third New International Dictionary, p. 2033.

describe the quantum of proof required to establish probable cause under Rule 23, since the standard is expressed as follows: "the judge shall determine if such proof establishes the *probability* that *all* the elements are present, to wit, the probability that such imputed offense was committed. Concomitant to said review, he must determine whether proof exists that probably connects the accused with the offense probably committed." (Emphasis in the original). See, Appendix to our Petition, pp. 103-104; see also, pp. 12-13 of our Petition.

A mere trace of evidence does not establish a "probability" that a felony was committed and that the accused committed it.

In summary, Respondents have misrepresented the applicable standards in both California and Puerto Rico, in their latest attempt at distinguishing the "indistinguishable."[4]

2. Fair trial vs. press rights in Puerto Rico

Respondents assert, at p. 9 of their Brief, that the court below had a "reasonable basis" to conclude that *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) is not controlling. Since Puerto Rico is "compact" compared to California, publicity has the potential of being more adverse to "a defendant."[5] No cases are cited, while both the Respondents and the court below refrain from even passing reference to the leading case in this field, which is settled precedent. *People v. Lebrón González*, 13

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[4] See *Chardón v. Fernández*, 454 U.S. 6, 8 (1981), cited in *Rivera Puig*, slip op. at p. 30.

[5] However, preliminary hearings in the federal court in San Juan are open to the public and press.

Off.Trans. 107, 114-115 (1982) held that the defendant must prove that publicity has deprived him of a trial by an impartial jury, while rejecting that potential jurors must be completely ignorant of the proceeding:

> That end could only be achieved through an absolute prohibition which interferes with the right of the press to publish news of general interest . . .
>
> The aforesaid gains added importance in our country 'where the small territory and dense population is served by a highly competent mass media system, [and] it would be impossible to select a jury which is totally unaware and ignorant . . . Justice, therefore, cannot depend on ignorance'. (Citations omitted). Id.

The treatment given to the "geographical" argument explains why *Lebrón* was not cited by Respondents.

C. In Conclusion

Preliminary hearings held in Puerto Rico under Rule 23 are the equivalent of the trial type, adversary proceedings analyzed by this Court in *Press-Enterprise II*. They should be presumptively open to the public, as held by the First Circuit in *Rivera Puig*.

We request that our Petition for Writ of Certiorari be granted, and that the Supreme Court of Puerto Rico be reversed.

Respectfully submitted this 29th of March, 1993.

JUAN R. MARCHAND-QUINTERO
Counsel for Petitioners
P.O. Box 4227
San Juan, P.R. 00902-4227
Tel. (809) 721-2495